87-1389

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 198_

IN RE PETER B. THOMAS

PETITION FOR WRIT OF HABEAS CORPUS

or in the alternative the
petitioner above

v.

PETER J. TILTON, Director of the
Division of Probation and Parole

and

THE ATTORNEY GENERAL OF THE
STATE OF MAINE

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT
OF APPEALS FOR THE FIRST CIRCUIT

PETITION OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1A. Did the indictment and offer of proof at trial initiation specify the crime of which Thomas was convicted, which crime was that Thomas caused Mulkern to create a risk of serious bodily injury to himself and to others?

(17-A M.R.S.A. Sec. 57(1)(2)(A) in tandem with Sec. 211)

1B. Did the choice of verdicts acquit Thomas of the crime specified in the indictment, at the least because of an absolute lack of evidence, which crime was that Thomas created a risk of serious bodily injury to Mulkern and others?

(17-A M.R.S.A. Sec. 211)

2. Did the trial judge, at the least, therefore commit gross, harmful, and willful error in rendering a judgment of conviction, but moreover, is there from the record extant probable cause that said trial judge was an accomplice to the perjury attempted and/or conspired to be suborned by the prosecutor, and likewise is there probable cause that the prosecutor did so attempt to and/or conspire to suborn perjury?

(In the former case, 17-A M.R.S.A. Sec. 151(1)(3), 152(1)(3) and 451(1)(A)(B), and in the latter case, 17-A M.R.S.A. Sec. 151(1)(5), 152(1)(3) and 451(1)(A)(B).)

3A. Did the 1st Circuit Court of Appeals panel commit error in not finding probable cause for appeal out of ignorance of the law, to wit 17-A M.R.S.A. Sec. 57(1)(2)(A)?

3B. Did the 1st Circuit Court of Appeals panel commit error in not finding probable cause, moreover, because of a lack of regard for the first fundamentals of jurisprudence to be applied in consideration of the body of the law in general and the criminal law in particular?

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REFERENCE TO REPORTS IN COURTS BELOW

The opinions of the U.S. Court of Appeals for the 1st Circuit and the Federal District court are unreported. The opinion of the Maine Law Court is reported at 507 A.2d 1051. These opinions/judgments are in the Appendices A, B, and C respectively.

STATEMENT OF THE GROUNDS (JURISDICTION)

The jurisdiction of this Court is invoked pursuant to 28 USC 1651(a), 2241(a) & (c)(3), and 2254(a).

Petitioner is yet unlawfully held to the custody of probation on account of the deprivation of his constitutional rights in the instant criminal trial. A few days after his petition was filed in federal district court the State of Maine moved to revoke his probation. Papers concerning this action are shown in Appendix D at pages 39-44.

In the alternative, the jurisdiction of this Court is invoked pursuant to 28 USC 1254(1), 1257(3), and 1651(a).

The judgment (order) of the panel of the First Circuit Court of Appeals was entered on 27 August 1987. A motion for reconsideration en banc of the request for probable cause for appeal from the denial of the writ of habeas corpus was denied 9 October 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional and statute authorities referenced in the text of the petition are set out verbatim in Appendix E at page 45 and are specifically referenced by pagination in the Table of Contents.

STATEMENT OF THE CASE

Peter B. Thomas was indicted for the crime of reckless conduct. Pursuant to

17-A M.R.S.A. Sec. 211 the indictment reads in pertinent parts:

> "That on or about...the above named defendant Peter Thomas did recklessly create a substantial risk of serious bodily injury to John J. Mulkern and other persons in the immediate vicinity of said Peter Thomas with the use of a deadly weapon, namely a firearm, against his person or persons." (Br Aplnt, p. 39)

Amongst a number of pre-trial motions a Bill of Particulars was demanded. (Denied). (Br Aplnt, pgs. 40-41).

At the initiation of trial the prosecutor tracked the indictment in his offer of proof. He said, "Thomas shot at this motor vehicle and the motor vehicle went out of control...thereby endangering Mr. Mulkern and...other persons," (Tr 19); and he said, "Mr. Thomas knew the risks involved in firing a firearm at a moving motor vehicle...and yet he consciously disregarded that risk." (Tr 21).

The prosecutor was a party to a stipulation which the judge read to the jury as follows:

> "...that the defendant, Mr. Thomas at the time he confronted a vehicle and its occupants on Sawyer Street at about 11:45 p.m. on September 21, 1982 that Mr. Thomas (sic) had probable cause to believe that the vehicle was the same vehicle which had been involved in a burglary earlier that evening at the Maine Auto Accessories and at least some (sic) of the occupants were involved in that burglary." (Tr 295-296).

Subsequently the prosecutor put his witness in chief on the stand, Mulkern, who said that he was very drunk all that day, was driving, drunk, around in his car all day from bar to bar, drove his car home in the early evening, drunk, before he drove it, drunk, to go to a party close to Thomas's house, (which is near but not close to the store which was burglarized), to drink some more which is how he got shot at after some other people at the

party, he didn't know who, broke windows in Thomas's house. (Tr 310-314).

Mulkern testifies that he had problems controlling his car in the effort to escape from his predicament. (Tr 315-317).

Defense counsel made a motion for judgment of acquittal based on lack of facts that Thomas created risk. (Tr 341). The trial judge is ostensibly confused over the essential difference between creation of risk and lack of facts with respect thereto because he seems to be wontonly impressed moreover with the potential risk of shooting a weapon as being tantamount to a gross deviation per se. (Tr 345-348, especially 347). Lastly Thomas testified. He corroborated what others said about the actual presence of Mulkern's car in the vicinity of the burglary during that day and night, to wit: (1) spotted in the early afternoon,

(Tocci/Wentling, (Tr 50), Thomas, (Tr 363-364)), (2) identified by license plate number reported to the police in the early evening, (police dispatcher, (Tr 172), Thomas (Tr 383)), and (3) later in the evening when the burglars had returned to attack Thomas's house and from which resulted the arrest confrontation and Mulkern's conduct in attempt of escape from arrest. The car abandoned some 100-150 feet down the road had the license plate number reported earlier, (police officer, (Tr 125)). Thomas said he went to the store which had been burglarized after he saw the police arrive at it and that the police established an obvious burglary and theft. (Tr 384, 414-415).

Thomas also testified that he yelled for the occupants to "freeze," and that the driver immediately accelerated the vehicle against the position of Thomas who then shot the rear tire twice, (Tr 394-

395) in order to prevent its use as an escape vehicle or as a dangerous weapon. (Tr 398). (The sequence of 'action' events appears more naturally in Appendix F starting at page 57).

The prosecutor presented no direct, expert, or testimonial evidence during the trial that Thomas created a risk of serious bodily injury. At trial summation the prosecutor said to the jury about the items for which he presented no evidence:

> "You can ask yourselves, even though the bullets hit a tire, could they have...ricocheted into the car and hit someone...hit the gas tank in the rear of the car...caused the car to go out of control." (Tr 434).

But the crux of his argument he finally inveigles, leading off with:

> "Now the victims in this case, Mr. Mulkern and Mr. Ross...their conduct is not the issue." (Tr 435),

and, getting to the heart of his agenda,

> "The suggestion that Mr. Thomas had nothing to do with the car crashing, but in fact that was caused by the driver of the car himself, I submit

> that this is a reasonably foreseeable result...of leveling a handgun through the passesnger window three feet away..." (Tr 456-467).

The trial judge did not instruct the jury in the law pursuant to 17-A M.R.S.A. Sec. 57(1)(2)(A), captioned, "criminal liability for the conduct of another." But he did give the jury a multi-choice verdict form. It reads:

> "1. Not guilty of any offense; or
> 2. Guilty of reckless conduct with the use of a dangerous weapon, namely a firearm, against a person or persons; or
> 3. Guilty of reckless conduct with the use of a dangerous weapon." (Br Aplnt, p. 49) (TR 477-478, 485, 489, 493, 501-502)

Upon appeal to the Maine Law Court one of several questions raised by defense counsel concerned the insufficiency of evidence to prove that Thomas created a substantial risk. (Br Aplnt, 17-19.) In an opinion eight reporter columns long the Court said this about that:

> "Defendant also argues that the evidence was insufficient to prove

> that his conduct caused the creation of a substantial risk of serious bodily injury to another person. The record amply supports a conclusion that defendant's conduct created such a risk. The evidence in this case supports the jury's conclusion that all of the elements of reckless conduct were proved beyond a reasonable doubt." (1054, headnote 5; App. C at p. 31).

The rest of the opinion was consumed with the task of stating legislative acts using the rationale of jury reasonableness as a stalking horse. Some points of interest are: (1) Notwithstanding that defense argues that the third option on the verdict form does not track a statute, we say that the third of verdict choices on a written verdict form doesn't have to track the indictment, (1053(1,2)); (2) The shooting of a tire of a moving motor vehicle is <u>per se</u> a gross deviation from reasonable conduct, (1054(5)); (3) Any evidence in a stipulation of probable cause sufficient to warrant an arrest is <u>ipse dixet</u> out of order (out of sight) and

to be disregarded (out of mind) so it can be argued that the state negated the existence of the justification of deadly force to effect an arrest (1054(6,7)); and (4) The evidence in the stipulation that the vehicle confronted in the shooting was the same vehicle Thomas had earlier confronted' with a holstered weapon (Tr 371,4), at which latter time he took note of the license plate number and in the confrontation outside the car was within 10 feet and less of the vehicle's occupants (Tr 374), and from which Thomas might reasonably presume the burglars saw he was armed and a private citizen, and knew as much later at the arrest confrontation, is per se out of order and is to be disregarded. (1055(8)).

Next a petition for post-conviction review was filed and summarily dismissed without hearing. (App. B at p. 12).

Next a petition was filed in federal district court for a writ of habeas corpus pursuant to 28 USC 2254; which petition[1] invoked the due process clause of the 14th Amendment on the grounds that there was an insufficiency of evidence that Thomas created a substantial risk of serious bodily injury pursuant to 17-A M.R.S.A. Sec 211. Responded that Court:

> "Having reviewed the trial transcript the Court concludes that a rational trier of fact could have found Petitioner guilty beyond a reasonable doubt on the evidence presented at trial." (App. B at p. 14).

Next Mr. Thomas accepted counsel's resignation from this case as his 'defense' counsel.

Several days after Thomas had signed the instant petition for habeas corpus the State of Maine noticed him for a probation violation. The state alleges that Thomas

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[1] Record, federal district court, Vol. A, WO.A.1.; Petition, p. 4 etc.

violated a condition of his probation, "that he refrain from criminal conduct," and so alleged he had committed a crime some eight months earlier. Petitioner did not testify at the revocation hearing and the matter is on appeal to the law court.[2] (App. D at p. 39-44).

Next Thomas, pro se, filed a notice of appeal to the 1st Circuit and filed his memorandum in support of his request for a certificate of probable cause for appeal.[3] This memorandum invoked the 6th and 14th Amendments on the grounds, (1) of an absolute lack of evidence that Thomas

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[2] Law Docket No. CUM 87-289, on appeal from Superior Court, Criminal Action Docket No. 82-1582. Companion indictment to probation revocation, Docket No. 87-877.

[3] Record, circuit appeals court, Vol. ___, No. ___, Memorandum, p. 1-4; Vol.___, No. ___, Motion En Banc Reconsideration, p. 1-3.

created risk to Mulkern and others unlawfully, and (2)(a) on the grounds that the prosecutor surreptitiously enlarged the legal foundation of the state's theory, (b) had intentionally planned and conspired to switch the theory, and (c) had in fact unlawfully secured a conviction of Thomas for causing Mulkern to create a risk to himself and others. Thomas also alleged that the prosecutor committed subornation of perjury.

The 1st Circuit Court of Appeals panel said:

> "The jury applying common sense, could permissibly conclude that the firing of a gun at a vehicle would cause the driver...to panic thus creating a substantial risk of injury, (from, e.g., the driver loosing control of the vehicle in his panic);" (App. A at p. 4).

And it further said:

> "Defendant seems to be arguing that he was not reasonably on notice that the causation element could be satisfied if the jury were to find that the defendant's conduct caused the driver to panic and the driver's

panic then caused the crash." (App. A at p. 6).

A motion for reconsideration, there having been no hearing, was denied. (App. A at p. 9.)

ARGUMENT

Reasons for the Writ of Habeas Corpus

The Court will note in review of the petition below that the 1st Circuit Court of Appeals has rendered a decision in conflict with (1) many if not most of the other circuit courts, (2) its own previous decisions, and (3) decisions of this Court.[4] In so doing it has so very far departed from the accepted and usual course of judicial proceedings, and so far

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[4] Stirone v. U.S., 361 U.S. 212; wherein the Court cannot permit a defendant to be tried on charges that are not in the indictment against him, citing U.S.C.A. Const. Amend. 5.

sanctioned a horrendous departure by the Maine Law Court and Superior Court as to call for the immediate exercise of this Court's power of supervision.

The 1st Circuit Court's conduct and that of the above said inferior courts has operated around a vacuum in the federal law which has not been but sorely needs be filled by a decision of this Court.

The collusion in the trial described below dependant upon the vacuum continues unabated. The State of Maine still holds petitioner to probation custody, pending incarceration, and has in the process imposing incarceration continued its conspiracy to deny to petitioner sufficient and lawful notice of an alleged crime. Tracking the dictum in Morrissey v. Brewer, 408 U.S. 471, Gagnon v. Scarpelli, 411 U.S. 778, and Black v. Romano, 471 U.S. 606, the statute law in Maine requires that a probation revocation

motion set forth in detail the facts underlying the alleged violation, 17-A M.R.S.A. 1205(2). The Court can easily determine that the prosecutor/hearing justice failed to do/require performance according to the statute and this Court's decisions. The motion in fact merely tracks the brief summons. (App. D c.f., p. 41, 42 to p. 39, 40).

If petitioner is obliged during the pendency of an appeal there or a full rule certiorari here to remain in probation custody and so be subject to summary courts jurisdiction invoked by executive action, it will mean that in a case where a state has an adverse and unlawful interest against a defendant (in the record of this case because of the criminal liability of the trial judge and prosecutor), such a defendant will be, can easily be, constantly exposed to the machinations of an accepted extra-

constitutional process conducted according to (in Maine) sub-subconstitutional safeguards and protections. Conceivably the State can maintain petitioner on a legal treadmill for as long as it plans.[5] Such a condition is tantamount to slavery. The circumstance poses an extraordinary threat to petitioner's liberty and to the concept of ordered liberty.

Pursuant to Rule 27.3(a) petitioner would here propound that the reason he has not sought application to the federal district court for the writ based on the extraordinary circumstances additionally resulting from the probation revocation and his claims with respect thereto is that said federal district court refused to grant the writ of habeas corpus upon

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[5] It remains to be seen what new judicial doctrines, or vacuums therein, the state will mine in order to continue to vex petitioner and force him to become further schooled in law.

his application based on his claims with respect to the trial and conviction which resulted in the state taking probation jurisdiction over the person of petitioner, and that said district federal court could not now countenance review of his claims of continued collusion and conspiracy, having found none in the trial when reviewed in the previous petition and that such remedy as said court might possibly see fit to apply in review of the questions arisen from the probation revocation itself would be partial, incomplete, and inadequate to the ends of justice and the security of petitioner's law and person.

Petitioner has exhausted his remedies in the state courts and in the lower federal courts with respect to claims arising out of the trial and conviction as is set out in the statement of the case above and the argument below.

So said and that the text and notes below well demonstrate why adequate relief cannot be had from any other court, this introduction to the trial and conviction claims premises that, given the Court's decision that petitioner is to prevail on the merits concerning the trial and conviction, which he warrants is a conclusive requirement, adequate relief is not to be had in any other usual form except by writ of habeas corpus issuing from this Court.

FAILURE OF NOTICE AND CERTAINTY

The crime Thomas was convicted of necessitates that a tandem relationship be established between the elements of Title 17-A M.R.S.A. Sec. 211 and the elements of 17-A M.R.S.A. Sec. 57(1)(2)(A). Thus such a relationship appropriately integrated

into an indictment might read in part at least:

> "That on or about...in the city...county...and State of...the above named defendant Peter B. Thomas did recklessly cause John J. Mulkern to recklessly create a substantial risk of serious bodily injury to himself and to others, and said defendant did recklessly create a substantial risk of serious bodily injury to John J. Mulkern and to others with the use of a dangerous weapon, a firearm...etc."

This 'example' indictment should be compared with the text of the actual indictment above (p. 7 and cite thereof).

Thomas did not receive notice in the indictment or in the offer of proof made by the prosecutor Duffet at trial initiation that he was to be tried for the elements of the crime which are underlined above and are contained in 17-A M.R.S.A. Sec 57(1)(2)(A). Thomas's indictment, which is tracked by the prosecutor's (hereinafter Duffet) offer of proof at trial initiation (1) solely references

17-A M.R.S.A. Sec. 211, (2) solely tracks or incorporates the elements from 17-A M.R.S.A. Sec. 211, and (3) contains no elements or facts referent of the elements in 17-A M.R.S.A. Sec. 57(1)(2)(A).[6]

This failure of notice and certainty is a violation of Thomas's Sixth and Fourteenth Amendment rights; to wit, the offense has not been described at all, U.S. v. Cruikshank, 92 U.S. 542 at 557, and, Thomas was denied any real notice of the true nature of the charge against him, Smith v. O'Grady, 312 U.S. 329 at 334.

COUP DE LOI

Perjury as Law Practice

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6 U.S. v. Lyons, 670 F.2d 77, cert. den., 457 U.S. 1136, U.S. v. Pazsint, 703 F.2d 420, appl. aftr. rem., 728 F.2d 411, U.S. v. Samuels, 741 F.2d 570, U.S. v. Yeo, 739 F.2d 385, to wit, commonly, a person cannot be convicted of an offense not charged in the indictment. U.S. v. Varoz, 740 F.2d 772, a person cannot be convicted of a theory not charged in the indictment.

Thomas was found "guilty of reckless conduct with a dangerous weapon"; this is the 3rd verdict choice the judge ostensibly lawfully derived from his rendition of 17-A M.R.S.A. Sec. 211. The prosecution argued it was a sentencing differentiation. (Br Aplee, p. 8-9). The Maine Law Court glossed that over by stating that a verdict form need not set forth allegations with the specificity of an indictment. (App. C, p. 27). The obvious question is this: shouldn't the choices on a multi-choice verdict form have to be derivable from the alternatives as provided in the statutes? The alternative in the statutes which was missing from the verdict choice set in this trial is 17-A M.R.S.A. Sec. 57(1)(2)(A).

The lawful derivation of verdict choices from the relevant statutes in the

case compiled into a multi-choice verdict form might read in part, at least:

1. Not guilty of any offense; or
2. Guilty of reckless conduct with the use of a dangerous weapon, namely a firearm, against a person or persons; and/or
3. Guilty of the Reckless Conduct of a person or persons on account of the reckless use of a dangerous weapon against that person or persons...

This 'example' verdict choice set should be compared with the text of the actual verdict choice set the judge wrote (above p. 12 and cite thereat).

Thomas did not obtain his law in the third choice of the actual verdict choice set or in the instructions with respect thereto which would require the jury to find a verdict on a crime or crimes defined by the statutes, by allowance of a set of verdict choices all of which were derived from the relevant statutes, the derived form of which with respect to 17-A M.R.S.A. Sec. 57(1)(2)(A) is underlined

above in the 'example' verdict choice set.[7]

The only way that the actual third verdict choice can be made sensible is in respect of 17-A M.R.S.A. Sec. 211, and then only if the prosecutor Duffet proves that the use of the firearm against the tire results in physically causing the car to go out of control thus creating risk to Mulkern and/or Ross, e.g. by severing the

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[7] If it is accepted that the actual verdict choice #2 is derived from the statute lawfully, then with that relationship as the template syllogism we can revive from the actual verdict choice #3 the 'law' from which it is derived. It is to be found that the law so revived is a bogus law---judge made law and bad law at that. That revived bogus law reads: "A person is guilty of reckless conduct if he creates a substantial risk of serious bodily injury." The bogus law could be interpreted to proscribe suicide since without a second party victim referent the action is semantically reflexive standing alone. Nevertheless its potential vagueness in the context and environment of the trial took on a specific and unlawful function.

brake line, damaging the steering system, etc.[8]

This being the essential case the actual 3rd verdict choice is duplicative of all but one of the elements in 17-A M.R.S.A. Sec. 211 from which is lawfully and sensibly derived the actual 2nd verdict choice. But the essential and so then apparent partial duplicity serves a more insidious purpose than the speciously

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[8] If Thomas by this means of arrest does in fact physically cause the car to go out of control then the question arises as to whether those means are a gross deviation. This course at trial is possible even if the prosecutor fails to prove Mulkern innocent or even stipulates that Mulkern is a criminal since it is arguably a result of Thomas's creation of risk to Mulkern, and not the result of Thomas causing Mulkern to create risk. This question however is not even 'turned on' in this trial because of the lack of facts to support any form of physical causation of risk in the first place. This deduction is confirmed by, in any case the whole question superseded by, the jury return of not guilty to verdict choice #2, i.e. Thomas did not create risk to a person. See below p. 35-37.

gracious reduction of the sentence severity in that the underlying law from which it is derived is in fact not a law (see note 7 above, p. 28), not a statute, but a methodology, in the form of a vague euphemism, a suicidal truism, for clandestinely obfuscating and downgrading and subtending to 17-A M.R.S.A. Sec. 211 the additional causational element in 17-A M.R.S.A. Sec. 57(1)(2)(A) and for truncating the additional factual issues in that same statute.

The truncation of the factual issues removes from upon the prosecutor Duffet his burden of proof with respect to the innocence and/or criminal responsibility of Mulkern and/or Ross pursuant to 17-A M.R.S.A. Sec. 57(1)(2)(A). The obfuscation, downgrading, and subtending of the causational element in 17-A M.R.S.A. Sec. 57(1)(2)(A) permits the prosecutor Duffet to reach out for

conviction of Thomas by innuendo that Thomas causing Mulkern to create risk is essentially the same as Thomas causing risk.

Mulkern is an adequate witness in the case his innocence does not have to be established beyond a reasonable doubt. He was drunk, and, yes, off-handedly he is innocent, and he was merely trying to do the best he could to escape, albeit haphazardly, from a perilous predicament not of his own making. The probable cause stipulation emplaced in the record just prior to Mulkern's testimony allows the prosecutor Duffet to reenforce the standing inference into an almost articulate presumption (and soon to be hardened into the 3rd verdict choice conveying that presumption into the jury room) that even if Mulkern is a criminal, even if he is only probably a criminal, Thomas is still liable to be found guilty

because the essential risk Thomas created was that Mulkern might try to escape from the arrest.

Duffet has to know his extraction of Mulkern's testimony is subornation of perjury, since he, Duffet, has already stipulated probable cause to the effect that Mulkern's vehicle confronted at the arrest scene after the attack on the house was the same vehicle Thomas saw earlier when he briefly confronted the burglars upon their getaway from near the store they unlawfully entered. So Mulkern's testimony, albeit hazy and inarticulate, that the car was with him all day and night and not where others testified it had been until the arrest confrontation is known to Duffet as comprising false statements.

The jury need only have believed, as they were induced to believe in fact, that Thomas causing Mulkern to create risk

(17-A M.R.S.A. Sec. 57(1)(2)(A)) was a subspecies of or subset of Thomas creating risk (17-A M.R.S.A. Sec. 211) and that they had the duty or privilege to convict Thomas even if they believed Mulkern and/or Ross were not innocent and/or were criminally responsible.

As to the prosecutor's relationship to perjury, where he knew or should have known that testimony given to the trial was perjured the conviction must be set aside, U.S. v. Agurs, 427 U.S. 97, Mooney v. Holohan, 294 U.S. 103, 112. The judge may not have been instrumental in eliciting the perjury but accomplice to perjury does not require that that fact be established. Similar to the prosecutor it can be presumed that he knows the law, read the probable cause stipulation, heard the evidence, and designed the verdict choices based upon his view of the indictment. He has a duty to perform and

it is a lawful presumption that his omission to perform his duty is voluntary.[9]

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[9] The myriad of circuit court of appeals precedents which append to variance violations of substantial rights, and pointedly, (1) double jeopardy, and (2) surprise are not seemingly on point here. First, because of the jury choice on the multi-choice form there is no jeopardy, presumably. Secondly there is no surprise with respect to Mulkern's testimony since it is expected as part of the prosecutor's facial case-in-chief. It is the surreptitious and clandestine legal argument, innuendo, aided by the judge's cooperation and instruction, at the least in regard of the verdict choice set, making implicit use of Mulkern's testimony (and his perjury) which must remain at focus here. It is the use of perjury, premised on the use of an indictment known to be legally defective to the prosecutor's facial theory, but necessary to his ultimate theory, which must remain at the forefront here. The prosecutor and judge didn't just willy-nilly stumble into a constructive amendment. The trial was fixed. Where circuit court of appeals have defined as a substantial right the right to have had a grand jury try the charges made out at trial to convict, see U.S. v. Lemire, 720 F.2d 1327, cert. den., 467 U.S. 1226, U.S. v. Weiss, 752 F.2d 772, wherein variance of proof (both), instructions (former), or theory (latter),

ACQUIT ON THE ELEMENTS IN THE INDICTMENT

In his offer of proof ostensibly pursuant to and tracking 17-A M.R.S.A. Sec. 211 Duffet says he is going to prove that Thomas created the risk of serious bodily injury----that Thomas caused the vehicle to go out of control. During the whole course of the testimony Duffet presents no such proof, no such kind of proof. In summation he intimates at the kinds of proof he might have attempted to make, (1) a ricochet to a person, (2) a ricochet to the gas tank (re explosion), and (3) the generic 'causing the car to go out of control.' How the latter might actually physically be caused is not mentioned. For instance there is not even

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Footnote Cont'd

affects essential element of offense charged. U.S. v. Keith, 605 F.2d 462, as to facts alone in the premises.

an attempt to show that there is any risk, much more a substantial risk, that a punctured tire can or could cause a vehicle to go out of control; as well there is no attempt to show that there is a substantial risk, or again any risk, that a ricochet could sever a brake line or dysfunction the steering mechanism. There is an absolute lack of evidence. The mention of possibilities in summation is not evidence. It is in view of this lack of evidence that the jury verdict, or rather the choice[10] of the verdict, must be considered an acquittal of Thomas on the charge of causing risk to a person as a result of his conduct. In effect the jury found him not guilty of that quantum

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[10] The second choice on the written verdict form (one which tracks the statute). See page 12 above and cite thereat.

of reckless conduct involved in unlawfully creating risk with a firearm against a person.[11]

TEN POUNDS OF FACTS IN A FIVE POUND LAW BAG

In this petition of habeas corpus the conviction and its rendition by the Law Court of Maine are relevant; however the character of the Law Court decision as legislative fiat has been pointed out above (p. 13-14) and it is the decision of the 1st Circuit panel that best demonstrates the basis of judicial reasoning which provides the premises from which takes off the Maine Law Court decision into the legislative realm. In

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[11] This also includes not guilty of that quantum of reckless conduct involved in unlawfully creating risk to a person with a firearm against a tire. See note 8 above, at/and p. 29.

passing we note that the judge of the federal district court is a recent member emeritus of the Maine Law Court.

The panel of the 1st Circuit Court of Appeals did seemingly make an honest effort. However, it seems that the requirement that evidence be viewed in the light most favorable to the prosecution has come to mean that the beacon of the law is not the light that brightens that view.

Interestingly enough the 1st Circuit panel did actually parse the elements of 17-A M.R.S.A. Sec. 57(1)(2)(A) without it occurring to them that from the use of the key word, causation, there might likely be a statute rendering their parse of the elements sensible such that it would not be the case that every criminal panicked at the thought of arrest would be able to say that the injury he created in escaping from arrest was caused by the person, say

policeman, who tried to arrest him. Neither the keyword, or reductio ad absurdum, the practical and literal consequence of their opinion caused them to reflect and look for a statute or to conceptualize the wont of a statute!

It was their failure to apply fundamental principles of jurisprudence which resulted in their inability to delineate the ridiculous incongruency of trying to read into 17-A M.R.S.A. Sec.211 the additional elements and facts, and the dichotomy between creation (of risk) and causation (of conduct), which are manifest in 17-A M.R.S.A. Sec. 57(1)(2)(A). They approved in review of the case what the trial judge accomplished in the conduct of the trial.

So they were left trying to stuff 10 pounds of law and facts into a 5 pound bag.

Thus it was that the 1st Circuit panel, instead of exercising the discretion and analysis necessary to the examination of probable cause was given over to a very dim search for the evidence; unlit by the beacon of the law, unfathomed by the wont of jurisprudencial fundamentals; and made to appear that its object was a determination to justify the termination of the appeal.[12] Ditto for the federal district court judge and in essence as to their premises the state Law Court judges.

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[12] The 1st Circuit Court of Appeals is itself well versed in the legal signification of variance, material variance, and constructive amendment. U.S. v. Gibson, 726 F.2d 869, U.S. v. Kelly, 722 F.2d 873, cert.den., 465 U.S. 1070, U.S. v. Flaherty, 688 F.2d 566. Otherwise it is well versed in the lack of, insufficiency of evidence. U.S. v. Wells, 766 F.2d 1363, U.S. v. Holmes, 632 F.2d 167, and Hughes v. U.S., 340 F.2d 609. Outside of the 1st Circuit other Circuit Appeal Courts have established relevant dictum, to wit, U.S. v. Beeler, 587 F.2d 340, app.aftr.rem. 648 F.2d 1103,

CONCLUSION: A Precedent Looking for a Court

Following the sense of the references and dictum of Supreme Court cases from a historical canopy of them, U.S. v. Staats, 8 How 41, U.S. v. Neurea, 19 How 92, U.S. v. Cruikshank, 92 U.S. 542, U.S. v. Carll, 105 U.S. 611, U.S. v. Hess, 124 U.S. 483, Pettibone v. U.S., 148 U.S. 197, and most recently Russell v. U.S., 369 U.S. 749, which are from the last of the era based on common law indictments, through the era of the various phases of codification of statutes, up to the present where indictments are based on statutes in one

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Footnote Cont'd

cert.den., 454 U.S. 860, U.S. v. Cusmano, 659 F.2d 714, app.aftr.rem., 729 F.2d 380, cert.den., 467 U.S. 1252, and U.S. v. Lyman, 592 F.2d 496, cert.den. 442 U.S. 931, respectively, an amendment is prejudicial per se, what is a prohibited amendment, and variance in proof may amount to a constructive amendment.

phase or another of systemic reorganization, this Court has constantly made clear that if the elements of a crime are not in a statute tracked in an indictment then the facts referent of the elements must be additionally set forth in the indictment.

In this era of systemic reorganization of statutes, the conceptualization of the system can become so sophisticated that the terms of art employed practically choke on facts which describe elements. As an example the Court might contemplate using facts to describe the underlined portions of the 'example tandem indictment' above at page 24.

The operational statement of the solution is then:

> "If the elements of a crime are not in a statute, then if not facts the other statute or statutes referent of the elements must be set forth in the indictment."

Minimally, since any statute describing a crime must have a forbidden conduct element or fraction thereof at the very least the operational statement, which is necessarily perhaps to be different from the 'law' statement in the actual flow and context of precedents, might be:

> "If all of the elements of the forbidden conduct of a crime are not in a statute then the other statute or statutes referent of the other forbidden conduct elements must be set forth in the indictment".

The abuse of the law is a constant problem, no doubt, but the above suggestion points to a definite method to eliminate the particular form of the abuse represented by this case.[13]

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[13] The 1st Circuit Appeals Court, in U.S. v. Gibson, 726 F.2d, 869 noted that for a defendant to prevail on a constructive amendment theory it must be shown that he was tried on a charge different from the one in the indictment

PRAYER

WHEREFORE Petitioner for all of the foregoing reasons prays this Court issue a Writ of Habeas Corpus directed to Peter J. Tilton, Director of the Division of Probation and Parole, and the Attorney General of the State of Maine, to which effect and purpose Petitioner is now here in propria persona before the Court, and so then order:

Footnote Cont'd

or that he was not informed of the nature and cause of the accusation. What posits this case as sui generis is that it was because the defendant was intentionally not informed of the nature and cause of the accusation to be tried the prosecutor was knowingly enabled to surreptitiously try him on a charge different from the one in the indictment, and because the judge intentionally designed the 3rd choice on the verdict form to convey that the presumptions that (1) Mulkern's innocence was immaterial and (2) causing conduct is a subsumable form of creating risk, both the judge and the prosecutor were able to reach out for an unlawful conviction. Their legal relationships to the perjury of Mulkern are the risks they undertake to carry out the plan.

(1) that Petitioner be released and quit from custody forthwith, and further direct that,

(2) Petitioner is acquit of the crime for which he was indicted pursuant to 17-A M.R.S.A. Sec. 211,

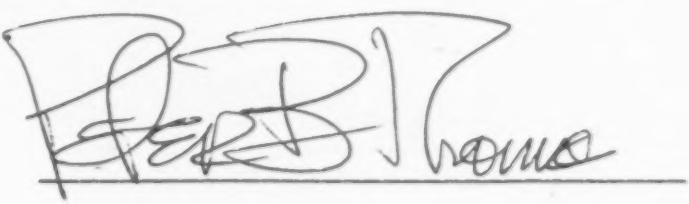
(3) Petitioner may not again be subject to jeopardy of prosecution for any crime pursuant to 17-A M.R.S.A. Sec. 211 in tandem with 17-A M.R.S.A. Sec. 57(1)(2)(A), or any crime arising out of the facts of the previous unlawful conviction and judgment,

(4) Petitioner's conviction and judgment be set aside as unlawfully obtained by process of the abuse of the law, to wit, perjury and failure to give notice as set out in the arguments above, and that,

(5) Petitioner is not now and may not be subjected to probation custody and/or incarceration pursuant to laws of

the state of Maine or the orders of any judge claiming or exercising jurisdiction pursuant to the same in these premises,

OR IN THE ALTERNATIVE for all of the foregoing reasons issue a Writ of Certiorari and so remand and direct as in the case above the relief and remedies to which Petitioner may be entitled in the premises.



DATED at Portland, Maine this 30 November, 1987.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
AUG. 27, 1987

No. 87-1663

PETER B. THOMAS,
Petitioner, Appellant,

v.

PETER J. TILTON, ETC., ET AL.,
Respondents, Appellees.

Before

Campbell, Chief Judge,
Bownes and Torruella, Circuit Judges.

ORDER OF COURT

Entered August 27, 1987

A store not far from defendant's home was robbed. Not long thereafter, a cinder block was thrown at defendant's house, breaking a window. Defendant observed portions of these events. Armed with a gun, defendant chased the persons he reasonably believed to be the culprits.

They reached their car and were about to pull away. Defendant cried freeze. The car accelerated, and defendant, a marksman, fired two shots at close range into a rear tire. The car drove off down the street and crashed into a truck. The occupants fled. Defendant was arrested. He was subsequently charged and convicted of reckless conduct with the use of a dangerous weapon in violation of 17-A M.R.S.A. Secs. 211(1), 1252(4) (1983). The Maine Supreme Judicial Court upheld his conviction. State v. Thomas, 507 A.2d 1051 (Me. 1986). The district court denied defendant's 28 U.S.C. Sec. 2254 petition and denied a certificate of probable cause. Defendant now seeks a certificate of probable cause from this court.

Defendant contends there was insufficient evidence that his actions

caused the creation of a substantial risk of serious bodily injury, and that hence his conviction was obtained in violation of the due process clause.[1]

There was evidence that the driver of the vehicle that was the object of

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[1] The statute defendant was convicted of violating, 17-A M.R.S.A. Sec. 211(1) provides:

> "1. A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person."

"Recklessly," in turn, is defined as follows:

> "A. A person acts recklessly with respect to a result of his conduct when he consciously disregards a risk that his conduct will cause such a result.
>
> . . .
>
> "C. For purposes of this subsection, the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and circumstances known to him, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation."

17-A M.R.S.A. Sec. 35(3).

defendant's shooting was inebriated. Defendant feels the only permissible view of the evidence is that the driver was the cause of both whatever risk the vehicle occupants faced and the subsequent crash. Indeed, defendant maintains that by shooting the rear tire, deflating it, and decreasing the vehicle's velocity, he lessened any risk of harm. The jury was not required to so find. The driver testified that once he was aware of the gun, his head cleared quickly, and he felt alcohol had not affected his driving. Rather, the crash was due to his fright and frantic effort to depart. The jury, applying common sense, could permissibly conclude that the firing of a gun at a vehicle would cause the driver, whether intoxicated or not, to panic, thus creating a substantial risk of injury (from, e.g., the driver loosing control of the vehicle in his panic); that defendant,

in shooting at the tire, consciously disregarded this risk; and that defendant's disregard of this obvious danger was a "gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation," within the meaning of the relevant Maine statutes.

We reject defendant's contention that he had insufficient notice of the State's case against him. Defendant says that the prosecutor argued for conviction on the basis that "defendant's conduct caused the victim's conduct to constitute reckless conduct," and defendant maintains that this "extended psychic causation comprising the forbidden conduct was not the specified forbidden conduct comprising the requisite element of the crime that the prosecution put forth in the indictment or in its offer of proof at

trial." Defendant seems to be arguing that he was not reasonably on notice that the causation element could be satisfied if the jury were to find that defendant's conduct caused the driver to panic and the driver's panic then caused the crash. In his opening statement, the prosecution stated defendant shot at the vehicle and the vehicle went out of control. Defendant apparently interprets the phrase going out of control to mean that the vehicle's physical condition was the sole cause of the crash and not that the loss of control could be due, in whole or in part, to the driver's fright. Defendant's interpretation is unduly restrictive. The fright theory is within the scope of the indictment and the evidence. Defendant did not claim surprise at any point during the receipt of evidence or the prosecution's closing argument. We see no merit to the contention.

In view of defendant's belief that the vehicle's occupants were fleeing burglars who had maliciously damaged his home and possibly had put defendant's tenants at risk of injury, it may be difficult for defendant to accept the jury's verdict. But only in limited circumstances may deadly force (and deadly force includes "intentionally or recklessly discharging a firearm...at a moving vehicle," 17-A M.R.S.A. Sec. 2(8)) be used to effect an arrest. 17-A M.R.S.A. Sec. 107(4)(B). The jury were instructed in the words of the statute and implicitly found the conditions were not met. For the reasons stated, the evidence sufficiently supports the view that defendant's attempt to take the law into his own hands was reckless conduct.

Defendant's motion to strike the District Court's denial of a Certificate of Probable Cause is denied. Defendant's request for a Certificate of Probable Cause is denied and defendant's appeal is terminated.

By the Court,

Francis P. Scigliano
Clerk.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1663

PETER B. THOMAS,
Petitioner, Appellant,

v.

PETER J. TILTON, ETC., ET AL.,
Respondents, Appellees.

Before

Campbell, Chief Judge,

Coffin, Bownes, Breyer, Torruella,
and Selya,

Circuit Judges.

Entered October 9, 1987

The motion for en banc consideration or reconsideration is denied.

By the Court,
Francis P. Scigliano
Clerk.

APPENDIX B

PETER B. THOMAS, Petitioner v. PETER J. TILTON, Director of the Division of Probation & Parole, and THE ATTORNEY GENERAL OF THE STATE OF MAINE, Respondents	)	CIVIL NO. 87-0104-P

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER DENYING PETITIONER'S REQUEST FOR HABEAS CORPUS RELIEF

This matter is before the Court a second time on Petitioner's request for habeas corpus relief pursuant to 28 U.S.C.

Sec. 2254 (1982).[1] For the reasons set forth below, the court denies the petition.

On June 13, 1985, a jury sitting in the Superior Court for Cumberland County, State of Maine, found Petitioner guilty of reckless conduct with the use of a dangerous weapon. 17-A M.R.S.A. Sec. 211 (1964).[2] On October 4, 1985, Petitioner was sentenced to a one-year term of imprisonment; all but thirty days of the sentence was suspended and Petitioner was

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[1] The Court dismissed Thomas's first petition for habeas corpus relief because it failed to allege that the Petitioner was "in custody." Memorandum of Decision and Order Dismissing Petitioner's Request for Habeas Corpus Relief, slip op. (D. Me. Mar. 13, 1987).

[2] 17-A M.R.S.A. Sec. 211 provides that "[a] person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person." 17-A M.R.S.A. Sec. 35(3)(A) provides that [a] person acts recklessly with respect to a result of his conduct when he consciously disregards a risk that his conduct will cause such a result."

given a probation period of one year. Petitioner appealed his conviction pursuant to 15 M.R.S.A. Sec. 2115 (1964) and Maine Rule of Criminal Procedure 37. On April 8, 1986, the Maine Supreme Judicial Court denied Petitioner's direct appeal. State v. Thomas, 507 A.2d 1051 (Me. 1986). Petitioner then filed for post-conviction review under 15 M.R.S.A. Secs. 2121-2132 (West Supp. 1986-87); that petition was summarily dismissed without a hearing on July 31, 1986. Respondent does not dispute that Petitioner has exhausted his state remedies with respect to the claim raised in this petition. Answer to Petition for Writ of Habeas Corpus at 3.[3]

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[3] The Court also notes that Thomas's probation term apparently expired on May 7, 1987. See Petition for Writ of Habeas Corpus at 2. However, because the petition was filed while Thomas was "in custody," and because collateral consequences of his conviction remain, the

Petitioner sets forth just one ground for relief in his present petition; he alleges that he was convicted on reckless conduct with a dangerous weapon without any proof that his actions "caused" the creation of a substantial risk of serious bodily injury to other persons. Petitioner argues, therefore, that the conviction violated his due process right to a fair trial. In considering Petitioner's claim, the Court's inquiry must be "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Footnote Cont'd

habeas petition is not moot and the Court must consider the merits. See Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985) (citing Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968)); Lefkowitz v. Fair, No. 86-1723, slip op. at 7 (1st Cir. Apr. 13, 1987).

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Having reviewed the trial transcript, the Court concludes that a rational trier of fact could have found Petitioner guilty beyond a reasonable doubt on the evidence presented at trial. Specifically, the Court finds that there was evidence on which a rational juror could have found that Petitioner's conduct "caused" the creation of a substantial risk of serious bodily injury to other persons. It appears uncontroverted, for example, that Petitioner fired two shots at the tires of a car occupied by four people. See Testimony of Paul Taylor (Tr. at 28);[4] Testimony of Robert Ross (Tr. at 95); Testimony of John Mulkern (Tr. at 313,

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[4] "Tr." refers to the trial transcript in State v. Thomas, Crim. No. 82-1582 (June 11-13, 1985), which was filed with the Court.

315); Testimony of Peter Thomas (Tr. at 395, 398). There also was evidence that the car was moving at the time Petitioner fired the shots. See Testimony of Mulkern (Tr. at 317-18); Testimony of Thomas (Tr. at 397-98). At least one witness testified that, following the shots, the tire "blew out" and the car swerved before finally hitting the tree. Testimony of Ross (Tr. at 95).

Although there is evidence, as Petitioner points out, to suggest that Mulkern's drunkenness or the speed at which he accelerated caused or contributed to causing the risk of serious bodily injury to others, the jury was free to weigh the evidence presented to it and to reach its own conclusion. It is sufficient for present purposes that there was evidence from which a rational juror could find or infer the requisite element of causation beyond a reasonable doubt.

The Petition for Writ of Habeas Corpus is therefore DENIED.

So ORDERED.

GENE CARTER
United States District Judge

Dated at Portland, Maine this 17th day of June, 1987.

A TRUE COPY
ATTEST: William S. Brownell, Clerk

C.E. Wilde
Deputy Clerk

APPENDIX B

COPY
U.S. DISTRICT COURT
PORTLAND, MAINE
RECEIVED AND DATED
1987 JUNE 19 AM 11:22
BY:_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PETER B. THOMAS,	)	
	)	
Petitioner	)	
	)	
v.	)	CIVIL NO.
	)	87-0104 P
PETER J. TILTON and	)	
ATTORNEY GENERAL OF THE STATE	)	
OF MAINE,	)	
	)	
Respondents	)	

J U D G M E N T

In accordance with the Memorandum of Decision and Order Denying Petitioner's Request for Habeas Corpus Relief, Carter, J., dated June 17, 1987, JUDGMENT is hereby entered for the respondents, Peter J. Tilton and the Attorney General of the

State of Maine, and against the Petitioner, Peter B. Thomas.

Dated at Portland, Maine this 19th day of June, 1987.

W. S. Brownell

Clerk, United States
District Court

A TRUE COPY
ATTEST: William S. Brownell, Clerk
By: C. E. Wilde
Deputy Clerk

APPENDIX C STATE v. THOMAS Me. 1051
Cite as 507 A.2d 1051 (Me. 1986)

STATE of Maine

v.

Peter B. THOMAS

Supreme Judicial Court of Maine.
Argued March 11, 1986.
Decided April 8, 1986.

Defendant was convicted on verdict in the Superior Court, Cumberland County, of reckless conduct with use of a dangerous weapon and appealed. The Supreme Judicial Court, Wathen, J., held that: (1) defendant had acted recklessly and created substantial risk or serious bodily injury; (2) defendant had not justifiably used force; (3) trial court could refuse to pose questions requested by defendant to prospective jurors; and (4) defendant could not obtain dismissal of indictment

based on alleged failure to inform him of privilege against self-incrimination.

Affirmed.

Paul Aranson, Dist. Atty., Laurence Gardner, Asst. Dist. Atty. (orally), Portland, for State.
Dunlap & O'Brien, Murrough H. O'Brien (orally), Portland, for defendant.

Before McKUSICK, C.J., and NICHOLS, ROBERTS and WATHEN, JJ.

WATHEN, Justice.

Defendant Peter B. Thomas appeals from a conviction entered by the Superior Court (Cumberland County) upon a jury verdict finding him guilty of reckless conduct with the use of a dangerous weapon, 17-A M.R.S.A. Secs. 211(1), 1252(4) (1983). On appeal, defendant challenges 1) the failure of the verdict form to delineate a crime under the Maine Criminal Code, 2) the sufficiency of the evidence to support the jury's verdict, 3) the trial justice's refusal during juror

voir dire to ask two questions requested by defendant, and 4) certain pre-trial rulings. We affirm the conviction.

I.

Defendant's conviction stems from a shooting incident that occurred on the evening of September 21, 1982 near defendant's home on Sawyer Street in Portland. With minor exceptions that will be noted, defendant's version of events is undisputed.

On the afternoon of September 21, 1982, defendant noticed a green car parked in the vicinity of his home near railroad tracks that separate Irving Street from the rear portions of businesses fronting on Forest Avenue. Later that day while at home, defendant heard sharp words exchanged in the street and the slam of a car door. Proceeding to a window, he observed a number of males standing around

the car he had noticed earlier. Defendant armed himself with a holstered automatic pistol and went outside to investigate. As he approached the car, defendant saw stereo equipment being loaded into the trunk and asked what was going on. No one responded to defendant's inquiry, and the group members got into the car and drove away. Defendant, suspecting a burglary, telephoned the police. Responding officers discovered a burglary at Maine Auto Accessories, a stereo store on Forest Avenue.

After talking to police officers at the stereo store defendant proceeded toward his residence. On his way, defendant saw the green car return on Sawyer Street and park facing against the direction of traffic so that the driver's door was next to the curb. A number of people got out of the car and, a short time later, began throwing rocks at

defendant's house.[1] Hearing breaking glass and a high-pitched scream,[2] defendant began to chase the assailants toward their car, arriving at the car just as its four occupants finished getting in. Defendant positioned himself adjacent to the passenger door two to three feet from the car and, pointing his drawn pistol at the car, shouted, "Freeze, m... f...." As

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[1] Two occupants of the vehicle testified at trial. They stated that the car had remained parked on Sawyer Street while they attended a party in a nearby wooded area. Both witnesses testified that they were very drunk at the time and that as they walked down Sawyer Street toward the car, one member of their group threw a rock and broke a window in defendant's house.

[2] Later investigation revealed a broken window in the ground floor apartment in defendant's house. Defendant testified that he was later told by the wife of his tenant that her child uttered the scream. The tenant, however, that upon hearing the window break he let out a loud scream and that the child was in bed at the time.

the vehicle pulled out from the curb,[3] defendant became "apprehensive" that the car would "sideswipe" him and decided to both move and shoot at the car's tire. He fired two shots, both of which penetrated the tire but did not strike the tire rim. The car left the curb, completely crossed the street, travelled downed the sidewalk on the opposite side of Sawyer Street, and crashed into a pickup parked along the sidewalk. The occupants of the vehicle fled on foot. A short time later, the police arrived and arrested the defendant.

In addition to relating the events described above, defendant testified as to his mental impressions during the incident. Defendant stated that when he

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[3] Defendant testified that although nothing blocked its path, the car veered sharply toward the street where he was standing. The driver testified that a parked car blocked his path and that he had to back up and then cut hard to the right to get the vehicle into the street.

gave chase, he was reasonably convinced, based on having heard breaking glass and a scream, that harm had been done to his tenants. He also testified that his purpose in chasing the group was to effect an arrest based upon the attack on his house and upon his suspicion that the people he was chasing had committed the stereo store burglary. Finally, the parties stipulated that when defendant confronted the vehicle, he had probable cause to believe that the green car and at least some of its occupants had been involved in the burglary.

II.

The presiding justice instructed the jury as to the elements included in the crime of reckless conduct as defined in 17-A M.R.S.A. Sec. 211 (1983). In addition, he instructed with regard to the allegations of the indictment, which, if

proved, would lead either to an enhanced sentencing classification or the imposition of a minimum mandatory sentence.[4] In an effort to delineate the findings available to the jury with regard to the sentence enhancing factors, the court, without objection, submitted a written verdict form that provided the following three options:

1. Not Guilty of Any Offense; or
2. Guilty of Reckless Conduct with the Use of a Dangerous Weapon, namely a Firearm, Against a Person or Persons; or
3. Guilty of Reckless conduct with the use of a Dangerous Weapon.

---

4 The indictment charged reckless conduct with the use of a dangerous weapon, namely, a firearm, against a person. Reckless conduct is a Class D offense. 17-A M.R.S.A. Sec. 211(2) (1983). Section 1252(4) converts the offense to a Class C crime if committed with the use of a dangerous weapon. In addition, subsection (5) provides for a minimum mandatory sentence for a Class C crime committed with the use of a firearm against a person. 17-A M.R.S.A. Sec. 1252(4), (5) (1983).

The jury returned a verdict in accord with the third option, finding defendant guilty of reckless conduct with the use of a dangerous weapon. The jury made the finding necessary for the offense to be converted to a Class C crime but rejected the finding that would have invoked a minimum mandatory sentence.

[1,2] Defendant does not dispute that the jury was properly instructed. Rather he argues that the third option on the verdict form does not adequately define a criminal offense because it fails to set forth that the reckless conduct must endanger a person or persons. When a written verdict form is used, it need not set forth allegations with the specificity required of an indictment. The original indictment includes sufficient allegations to charge reckless conduct with the use of a dangerous weapon. Under proper instructions, the jury found defendant

guilty of that offense. The alleged deficiency in the written verdict form is of not consequence.

III.

Defendant makes two discrete arguments in challenging the sufficiency of the evidence to support the guilty verdict. First, he argues that the evidence is insufficient to establish the elements of reckless conduct beyond a reasonable doubt. In addition, he argues that the evidence is insufficient to disprove beyond a reasonable doubt the existence of the defense of justifiable use of deadly force, as was the State's burden once the trial justice had ruled the defense to be generated by the evidence.

[3,4] Evidence is sufficient to establish the commission of a crime if a jury, viewing that evidence in a light

most favorable to the State, rationally could have found all elements of the offense to be proven beyond a reasonable doubt. State v. Hardy, 489 A.2d 508, 510 (Me. 1985). The elements of reckless conduct are reckless creation of a substantial risk of serious bodily injury to another person. 17-A M.R.S.A. Sec. 211 (1983). Recklessness in turn is defined as a conscious disregard of a risk that conduct will cause a result, in this case the creation of a substantial risk of serious bodily injury to another. Furthermore, the conscious disregard of the risk must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in light of the nature and purpose of the person's conduct and the circumstances known to him. 17-A M.R.S.A. Sec. 35(3)(A), (3)(C) (1983).

[5] Defendant argues that in light of his purpose of effecting the arrest of people he had seen attack his house and who he had probable cause to believe had committed a burglary, his conduct cannot be characterized, beyond a reasonable doubt, as constituting a gross deviation from reasonable conduct. The jury, however, was not compelled to accept defendant's post hoc testimony concerning his purpose. From the evidence, the jury reasonably could have concluded that defendant acted out of anger caused by the attack on his house. Assuming the jury rejected defendant's claim that he acted with the purpose of effecting an arrest, the record amply supports a finding that his actions amounted to a gross deviation from reasonable conduct. Even assuming the jury accepted defendant's testimony that he acted with the purpose of effecting an arrest, a jury could have

rationally found beyond a reasonable doubt that shooting the tire of a moving automobile with four people aboard amounted to a gross deviation from reasonable conduct.

Defendant also argues that the evidence was insufficient to prove that his conduct caused the creation of a substantial risk of serious bodily injury to another person. The record amply supports a conclusion that defendant's conduct created such a risk. The evidence in this case supports the jury's conclusion that all of the elements of reckless conduct were proven beyond a reasonable doubt.

[6, 7] We move next to defendant's claim that the evidence was insufficient to negate the defense of justifiable use of deadly force to effect a citizen's arrest. The presiding justice instructed

the jury on this defense in accordance with the statutory definition, which reads:

> 4. A private person acting on his own is justified in using:
> ...
> B. Deadly force only when he reasonably believes such force is necessary:
> ...
> (2) To effect a lawful arrest or prevent the escape form such arrest of a person who in fact
> (a) has committed a crime involving the use or threatened use of deadly force, cr is using a deadly weapon in attempting to escape; and
> (b) the private citizen has made reasonable efforts to advise the person that he is a private citizen attempting to effect an arrest or prevent the escape from arrest and has reasonable grounds to believe the person is aware of this advice or he reasonably believes that the person to be arrested otherwise knows that he is a private citizen attempting to effect an arrest or prevent the escape from arrest.

17-A M.R.S.A. Sec. 107(4)(B)(2) (1983). Once sufficient evidence is introduced to generate an issue regarding justification, the State carries the burden of negating the existence of justification beyond a

reasonable doubt. State v. Lagesse, 410 A.2d 537, 542 (Me. 1980). Merely because evidence is sufficient to generate an issue as to an asserted defense, however, does not mean that the jury is compelled to believe that evidence. Id.

[8] The only evidence that defendant utilized deadly force to effect an arrest consists of his own testimony. A noted above, the jury was not compelled to believe this testimony and, from the evidence, could rationally have found some other motivation for defendant's actions. In addition, the jury rationally could have found that defendant did not make reasonable efforts to advise the occupants of the car that he was a private citizen attempting to effect an arrest or that defendant could not have reasonably believed the occupants of the car otherwise knew the same. We conclude that

the evidence was sufficient to negate the asserted defense beyond a reasonable doubt.

IV.

[9] Defendant next challenges the refusal of the presiding justice to ask the following questions on juror voir dire:

> Generally, would you feel uneasy in the presence of a person wearing a holstered handgun?
>
> Do you agree with the law that prohibits a citizen from owning, possessing or carrying a handgun without a license?

As the presiding justice noted in rejecting the first question, the subject of attitudes toward handguns was extensively covered in other, more specific questions that the court put to the jury at defendant's request. As to

the second question, the court pointed out that it incorrectly states Maine law, see 25 M.R.S.A. Sec. 2003 (Pamph. 1985-1986), and afforded defendant an opportunity to rephrase the question, which he refused. We find the court's actions to be well within the broad discretion afforded to a presiding justice in determining the scope of voir dire. See State v. Lovely, 451 A.2d 900, 901 (Me. 1982).

V.

Prior to trial, defendant moved to dismiss the indictment on the ground that his testimony before the grand jury was obtained in violation of his fifth amendment rights against self-incrimination because the State failed to inform his adequately of those rights. Defendant now claims that the Superior Court erred by denying his motion to dismiss. The State responds that even if

a constitutional violation occurred, dismissal of the indictment is not an appropriate remedy. We agree.

[10] The United States Supreme Court has held that an indictment valid on its face is not subject to challenge on the ground that it is based on information obtained in violation of the defendant's fifth amendment privilege against self-incrimination. United States v. Calandra, 414 U.S. 338, 344-45, 94 S.Ct. 613, 618-19, 38 L.Ed.2d 561 (1974); Lawn v. United States, 355 U.S. 339, 349-50, 78 S.Ct. 311, 317-18, 2 L.Ed.2d-321 (1958). This Court has previously acknowledged, citing Calandra, that an indictment may be returned on the basis of evidence not competent for presentation at trial. State v. St. Clair, 418 A.2d 184, 186 n.2 (Me. 1980). Because dismissal of the indictment would not have been an

appropriate remedy even if a constitutional violation existed, the court did not err in denying defendant's motion to dismiss.

Finally, defendant claims reversible error in two rulings made by the presiding justice during the hearing on defendant's motion to dismiss. First, the court impounded a tape recording that defendant had surreptitiously made of his testimony before the grand jury, but only after allowing defendant to testify with the aid of a transcript of that recording. Second, the motion justice refused to allow defendant to call to the stand the prosecutor who presented the case to the grand jury. We need not consider whether the motion justice committed any error because, dismissal of the indictment not being an available remedy, any error that might have occurred would have been

harmless.

The entry is:

Judgment affirmed.

All concurring.

APPENDIX D

STATE OF MAINE
Cumberland, ss,
Clerk's Office
SUPERIOR COURT
APR 15, 1987
RECEIVED

STATE OF MAINE
DEPARTMENT OF CORRECTIONS
PROBATION AND PAROLE

STATE OF MAINE	)	DOCKET NO. CR 82-1582
	)	
v.	)	OFFENSE: VIOLATION OF
	)	PROBATION
PETER THOMAS	)	

You are hereby summoned to appear before the Superior Court of the State of Maine at the Courthouse in Portland, County of Cumberland, on the 6th day of May, 1987 at 9:00 a.m. to answer to the charge that you violated the conditions of your Probation in the following manner:

By failing to comply with that condition of your Probation set forth in 17-A M.R.S.A., Section 1204-1, which states that you are to refrain from criminal conduct in that during the months

of May through September of 1986, you committed the new criminal offense(s) of Trafficking in Prison Contraband.

Corrine M. Zipps 4/13/87
_____
Officer/Date

This Summons was received by me at 170 Brackett Street, Portland on April 13, 1985. As to receipt.

Peter B. Thomas
_____
Probationer

* * * * * * * * * *

Having used due diligence, I cannot locate _____ for the purpose of arrest or service of the foregoing summons. I respectfully request the Court to issue a Warrant for the arrest of _____.

_____
Officer

APPENDIX D

STATE OF MAINE
Cumberland, ss,
Clerk's Office
SUPERIOR COURT
APR 15, 1987
RECEIVED

STATE OF MAINE
DEPARTMENT OF CORRECTIONS
PROBATION AND PAROLE

Date: April 13, 1987

MOTION FOR PROBATION REVOCATION

To the Honorable Justice of the Superior Court of Cumberland County:

Respectfully representing Probation and Parole, Corinne M. Zipps, Field Officer, states that one PETER THOMAS was convicted of Reckless Conduct with Use of a Dangerous Weapon (Class C) in this Court on October 4, 1985, Docket No. CR 82-1582, and was sentenced as follows: 1 year DOC, all but 30 days suspended, Probation One Year; Appealed; Judgment Affirmed April 4, 1986.

It is now reported by Corrine M. Zipps representing Probation and Parole that there is probable cause to believe that the said PETER THOMAS has violated the terms of probation in the following manner:

By failing to comply with that Condition of his Probation as stated in M.R.S.A. Title 17-A, Section 1204-1 which states that he is to refrain from criminal conduct in that during the months of May through September of 1986, he committed the new criminal offense(s) of Trafficking in Prison Contraband.

It is therefore requested that the Probation of PETER THOMAS be revoked.

April 13, 1987 Corinne M. Zipps

Date Officer

Hearing Ordered: Justice_____Date_____
Date of Hearing_____
Motion Dismissed:Justice_____Date_____

APPENDIX D

STATE OF MAINE

Cumberland,ss. Superior Court
CR 82-1582

State of Maine
v.
Peter Thomas
Defendant

REVOCATION OF PROBATION

On the 10th day of July, 1987, the defendant appeared in person (and by counsel) to answer the charge that the defendant had violated one or more of the conditions of probation attached to the judgment of this court in this case.

A hearing having been held,

It is adjudged that the defendant has violated one or more of the conditions of probation attached to said judgment, and it is ORDERED that the order of probation contained in the judgment of this Court in this case, is hereby:

/x/ revoked and the court orders that the defendant serve 90 days D/C of the unserved portion of the sentence so imposed and that probationary period continue in effect as provided by law and that this order be attached to and made a part of said judgment.

/_/ revoked and the court imposes the sentence of imprisonment that was suspended when probation was granted, namely _____

_____

and that said judgment and sentence be executed and that this order be attached to and made a part of said judgment.

S. Perkins

_____

Justice, Superior Court

A TRUE COPY
ATTEST:_____
Clerk
Dated:_____, 19__

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT [VI]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Sec. 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MAINE CRIMINAL CODE

TITLE 17-A

Sec. 16. Warrantless arrests by a private person

Except as otherwise specifically provided, a private person shall have the authority to arrest without a warrant:

1. Any person who he has probable cause to believe has committed or is committing:

A. Murder: or

B. Any Class A, Class B or Class C crime.

2. Any person who, in fact, is committing in his presence and in a public place:

A. Any of the Class D or Class E crimes described in sections 207; 209; 211; 254; 255; 501, subsection 2; 503; 751; 806 or 1002.

3. For the purposes of subsection 2, in the presence has the same meaning given in section 15, subsection 2.

Sec. 57. Criminal liability for conduct of another; accomplices

1. A person may be guilty of a crime if it is committed by the conduct of another person for which he is legally accountable as provided in this section.

2. A person is legally accountable for the conduct of another person when:

A. Acting with the intention, knowledge, recklessness or criminal negligence that is sufficient for the commission of the crime, he causes an innocent person, or a person not criminally responsible, to engage in such conduct; or

B. He is made accountable for the conduct of such other person by the law defining the crime; or

C. He is an accomplice of such other person in the commission of the crime, as provided in subsection 3.

3. A person is an accomplice of another person in the commission of a crime if:

A. With the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or commit-

ting the crime. A person is an accomplice under this subsection to any crime the commission of which wa a reasonably foreseeable consequence of his conduct; or

B. His conduct is expressly declared by law to establish his complicity.

Sec. 107. Physical force in law enforcement

4. A private person acting on his own is justified in using:

A. A reasonable degree of nondeadl force upon another when and to the extent that he reasonably believes i necessary to effect an arrest or detention which is lawful for him to make or prevent the escape from such an arrest or detention; or

B. Deadly force only when he reasonably believes such force is necessary:

(1) To defend himself or a 3rd person from what he reasonably believes to be the imminent use of deadly force: or

(2) To effect a lawful arrest or prevent the escape from such arrest of a person who in fact:

(a) has committed a crime involving the use or threatened use of deadly force, or is using a deadly weapon in attempting to escape; and

(b) the private citizen has made reasonable efforts to advise the person that he is a private citizen attempting to effect an arrest or prevent the escape from arrest and has reasonable grounds to believe the person is aware

of this advice or he reasonably believes that the person to be arrested otherwise knows that he is a private citizen attempting to effect an arrest or prevent the escape from arrest.

Sec. 151. Conspiracy

1. A person is guilty of conspiracy if, with the intent that conduct be performed which, in fact, would constitute a crime or crimes, he agrees with one or more others to engage in or cause the performance of such conduct.

5. Accomplice liability for crimes committed in furtherance of the conspiracy is to be determined by the provisions of chapter 3, section 57.

Sec. 152. Attempt

1. A person is guilty of criminal attempt if, acting with the kind of culpability required for the commission of the crime, and with the intent to complete the commission of the crime, he engages in conduct which, in fact, constitutes a substantial step toward its commission. A substantial step is any conduct which goes beyond mere preparation and is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime.

3. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under chapter 3, section 57 were the crime committed by the other person, even if the other person is not guilty of committing or attempting the crime.

Sec. 211. Reckless conduct

1. A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person.

2. Reckless conduct is a Class D crime.

Sec. 451. Perjury

1. A person is guilty of perjury if he makes:

A. In any official proceeding, a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true; or

B. Inconsistent material statements, in the same official proceeding, under oath or affirmation, both within the period of limitations, one of which

statements if false and not believed by him to be true.

Sec. 1204. Conditions of probation

1. If the court imposes a suspended sentence of imprisonment with probation or a suspended fine with probation, it shall attach such conditions of probation, as authorized by this section, as it deems to be reasonable and appropriate to assist the convicted person to lead a law-abiding life, provided that in every case it shall be a condition of probation that the convicted person refrain from criminal conduct.

Sec. 1205. Commencement of probation revocation proceedings

1. If a probation officer has probable cause to believe that a person under his supervision has violated a condition of his probation, he may arrest such person or he may deliver a summons to

such person ordering him to appear for a court hearing on the alleged violation. If the probation officer cannot, with due diligence, locate the person in order to arrest him or serve a summons on him, he shall file a written notice of this fact with the court which placed the person on probation.

2. The summons delivered pursuant to subsection 1 shall include the signature of the probation officer, a brief statement of the alleged violation, the time and place of the alleged violation and the time, place and date the person is to appear in court. As soon as practicable after service of the summons, the probation officer shall file with the court a motion for revocation of probation, which shall set forth in detail the facts underlying the alleged violation. A copy of the motion shall be furnished to the person on probation prior

to the court hearing on the alleged violation.

APPENDIX F

Thomas had in the afternoon of September 21st, 1982 noticed an unfamiliar vehicle parked adjacent to his house located on the corner of Irving and Sawyer Street.

Later in the evening of that same day he heard a commotion outside and went to investigate with a holstered weapon. He saw a group of individuals surrounding the car and loading boxes of electronic equipment into the car. Thomas took note of the license plate number of the vehicle as it quickly departed. He had two visual sight opportunities of the same individual. The first opportunity was partial but suspectful, as it occurred by the car as they were entering it to depart. The second opportunity occurred as the car was departing and the and individual put his upper body out the

window of the car and shouted an obscenity; this visual sighting was confirmatory of the first, and on its own, made practically certain an identification.

Thomas called the police and reported the license plate number. He indicated to the police he was unable to know that a burglary or any crime had in fact taken place, and suggested he would meet the police at the gas station from which Thomas had called the police.

The police went directly to what they had somehow established as the burglary site, a car electronics store. Thomas waiting at the gas station saw them go by within a few minutes of his call to the police. Since no police came to the gas station Thomas walked the short distance to the store location the police were investigating. There he learned that the store had in fact had a burglary and that

an obvious theft had taken place. One officer seemingly unavailable outside the store did not solicit information from Thomas. Thomas left his name and address and returned home; the officer was busy with radio communications.

Tenants of Thomas arrived home later, and Thomas went outside to talk with them adjacent to their car parked at the corner of Irving and Sawyer Streets at which corner Thomas's house is also located. Thomas confirmed in conversation with them that they had also seen in the afternoon the car Thomas described to them he had seen. Moments after the tenants went inside their apartment and Thomas was about to enter his apartment Thomas saw again the car he had that day seen twice earlier. Ominously, it was returning to the scene of the earlier confrontation.

As well the individual he had seen twice before at the confrontation was

driving the car. That person parked the car at or next to the corner of Irving and Sawyer Streets opposite but not diagonal from Thomas's house. This third visual opportunity was almost practically certain as to an identification. A group of people got out of the car, went in a direction away from Thomas briefly under the shadows of some trees, and then came back in the direction of Thomas and his house. They started running and at the curbside of the street corner threw or were throwing, all of them, unknown objects at the house. Thomas set out to arrest the attack which then, almost instantaneously, consisted of the sounds of breaking glass and a piercing scream coming from the apartment of his tenants. The attackers immediately started running towards their car.

Thomas came up to the front passenger window of the car which was facing the

street just moments after or as they had completed getting into the car. In his last few paces prior to setting himself opposite the passenger window Thomas had carefully begun to draw his weapon while running so that when he in fact arrived opposite the window his weapon was drawn and ready. Thomas uttered the command to "freeze," and the appellation "motherfuckers." Before he could, practically speaking, continue direction and notice the car started to pull out into the street against the position of Thomas. It seemed actually that sometime during the utterance of the appellation that the car began to move; and the distance between the car and Thomas, never large to begin with, was closing too fast for Thomas to want to continue moving his mouth since he perceived the necessity and the propriety of having to perfect the arrest then by moving his body away from

the car and prohibiting the further use of the car as either a dangerous weapon or as a functional escape vehicle. So Thomas placed two rounds from his firearm into the rear tire of the escaping vehicle. The angles of entry and exit show that when the bullets deflated the tire Thomas was between the front and rear tires but obviously approaching a position perpendicular to the rear tire----Thomas and the car were simultaneously moving in approximately opposite directions.

The car went down the street, grazed a truck, and came to rest on a lawn some 100-150 feet from where it was parked. Much controversy here. The state seems to be saying it crossed the street went down the sidewalk and them came to rest <u>under</u> a truck as it was trying to get back onto the street. The state's description is apocalyptic (Br. Applee. 6-7), but an

investigating police officer testified there was no damage (Tr. 147-148).

After Thomas deflated the tire he walked after the car as it went down the street to its resting place and positioned himself approximately but not closely opposite the driver's door and focused his attention and weapon briefly on the driver; he was running from right to left, unarmed, and after Thomas perceived he didn't or wasn't going to present a danger Thomas looked to check for the others. One had run directly ahead of and away from him, and the other had run back up the street and away from him. The latter two had both exited from the passenger side of the car which was facing towards the house the lawn of which the car had come to rest upon. The person who exited from the driver's seat, was the same person Thomas had visually sighted several times earlier. His name is Bobby Ross.

This last visual sight opportunity was more than practically certain albeit brief. The state says that John J. Mulkern was the driver. It doesn't matter.

Anyway after they all skeedaddled away Thomas espied a person at his open front door and called for him to call the police; he said he was already talking to them. Thomas went to the phone to make a report.